IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-cv-329-GKF (PJC)**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S RESPONSE IN OPPOSITION TO PETERSON FARMS, INC.'S MOTION IN LIMINE REGARDING FORMER EMPLOYEES (Dkt. #2395)

COMES NOW the Plaintiff, the State of Oklahoma, ex rel. W.A. Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, J.D. Strong, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA ("State"), and respectfully responds in opposition to Defendants' Motion in Limine Regarding Former Employees (Dkt. #2395) ("Motion in Limine") as follows:

I. Introduction and Background

Ron Mullikin ("Mr. Mullikin") was employed by Defendant Peterson Farms, Inc. ("Peterson") from the fall of 1997 to approximately August 2000. Ex. 1 (11/14/07 Mullikin Depo., p. 8). After about three or four months on the job, Mr. Mullikin became the director of corporate training and environmental affairs. *Id.* at 9-10. Prior to joining Peterson, Mr. Mullikin spent much of his career in the fertilizer business where he learned about nutrient soil science -- including plant agronomic need -- and how to take soil samples. *Id.* at 11-12. Mr. Mullikin's fertilizer-related experience and knowledge is

"probably" the reason that Peterson placed Mr. Mullikin into his role as director of environmental affairs. *Id.* at 12.

Prior to Mr. Mullikin becoming director of environmental affairs for Peterson, the company had never had anyone in that role. *Id.* at 13-14. At the time that Mr. Mullikin assumed the position as director of environmental affairs, Peterson was generally concerned about the amount of poultry waste being generated and its effect on the environment. *Id.* During his deposition taken in the *City of Tulsa* case, Mr. Mullikin testified that the integrators, including Peterson, started gaining awareness of the problems with excess phosphorus in northwest Arkansas in the mid-1990s. Ex. 2 (7/18/02 Mullikin Depo., pp. 167-69). As part of his duties and responsibilities with Peterson, Mr. Mullikin would regularly attend meetings on Peterson's behalf with government and agency personnel, poultry industry representatives and other "key players" regarding the environmental effects of land-applied poultry waste. Ex. 1 (11/14/07 Mullikin Depo. at 15-20).

In 1998, Mr. Mullikin wrote a series of memoranda to his superiors at Peterson notifying them of environmental concerns he had learned about in performing his duties as director of environmental affairs. On March 27, 1998, Mr. Mullikin submitted a memorandum to then-President of Peterson, Dan Henderson, stating, in pertinent part, as follows:

> I personally have no opinion on whether or not the integrator or the grower owns the litter. I do feel, without any doubt, that as time passes, we the integrator will be found to be liable for it and the affect [sic] it has on our environment. . . . Dan, I feel the direction of Peterson Farms and all integrators would be best served to focus its resources towards, would be alternative uses. Things such as using litter as bedding, feed, fertilizer and fuel are just a few of the uses I've found some information on. Each of these uses has it's [sic] own set of benefits and short-

> comings. But they all address the environmental need to stop applying litter to our local pasture lands.

Ex. 3 (3/27/98 Mullikin Memo). During his deposition in November 2007, Mr. Mullikin confirmed that the reason he made the statement concerning the "environmental need to stop applying litter to our local pasture lands" was because of the "loading of the soils, the lands, the pasture lands of phosphates and then it getting into the waterways." Ex. 1 (11/14/07 Mullikin Depo., pp. 57-58).

On July 24, 1998, Mr. Mullikin, while still employed by Peterson, submitted another memo to Mr. Henderson, and other Peterson executives, regarding a survey of Peterson growers taken at the time. Ex. 4 (7/24/98 Mullikin Memo). In particular, Mr. Mullikin reported to his supervisors as follows:

> Out of 37 fields, 31 had too high of a phosphorus level, which was anything above 300 pounds. This meant those who were in that range couldn't fully develop their [nutrient] management plan or put any more litter on their fields. Our growers feel as though they have no where left to turn.
>
> We need to continue to support anything we can to help the growers find ways to dispose of their litter.

Id. On November 24, 1998, Mr. Mullikin wrote a third memorandum notifying Mr. Henderson and other Peterson executives that: "[t]ime continues to pass with no new solutions of dealing with excess animal waste and environmental problems it is creating." Ex. 5 (11/24/98 Mullikin Memo).

On December 14, 1998, following receipt of these memoranda from Mr. Mullikin, Mr. Henderson (then-President of Peterson) sent a letter to all of Peterson's Arkansas growers, stating, "As you are aware, the issue of poultry litter being spread on land with too much phosphorus in the soil is continuing to come to the limelight in the State of Arkansas." Ex. 6 (12/14/98 D. Henderson Letter). Around this same period, Mr.

Henderson also sent a letter to Peterson growers attaching a "Water Quality Handbook" with the Peterson logo affixed to it. Ex. 7 (Water Quality Handbook Letter). In the letter accompanying the Water Quality Handbook, Mr. Henderson informed Peterson's growers that "Peterson . . . feels it is important to provide you with the most up-to-date information on water quality; information that will serve as a tool in managing your poultry operation." *Id.* Mr. Henderson confirmed during his deposition that Peterson had endorsed the Water Quality Handbook. Ex. 8 (Henderson Depo. at 58). The Water Quality Handbook contains several statements that prove Peterson's knowledge of the environmental impacts from poultry waste. For instance, the Water Quality Handbook provides:

> Poultry wastes also contain significant amounts of phosphorus. Phosphorus . . . contributes to environmental problems. In fact, it seems to be the limiting factor in the huge algae blooms that make lakes unfit for swimming and ultimately deplete their oxygen supply, deadening the water and killing fish. Phosphorus has become a major cause of water quality degradation.

Ex. 9 (Water Quality Handbook at PIGEON.0643).

The State has designated certain deposition testimony of Mr. Mullikin and Mr. Henderson for probable use at trial. The State has also designated portions of the deposition of Kerry Kinyon, also a former Peterson executive. All of these witnesses reside more than 100 miles from the courthouse. *See* Exs. 10 (Mullikin Map); 11(Henderson Map); 12 (Kinyon Map). The State also plans on presenting the memoranda and letters written by Mr. Mullikin and Mr. Henderson as admissions by a party-opponent and/or to prove that Peterson had knowledge of the environmental impacts that are likely to result from the land application of poultry waste. In its Motion in Limine, Peterson seeks to limit or exclude such testimony and statements. While it is understandable that Peterson would want to distance itself from the statements and

admissions of Mr. Mullikin and Mr. Henderson -- as those statements and admissions are damaging to Peterson's defense of this action -- Peterson provides the Court with no valid basis to do so. The Motion in Limine should be denied.

II. Argument

A. Use of the Deposition Testimony of Mr. Mullikin, Mr. Henderson and Mr. Kinyon Should *Not* Be Limited or Excluded

1. Fed. R. Civ. P. 32(a)

In pertinent part, Rule 32(a) of the Federal Rules of Civil Procedure provides:

> (3) *Deposition of Party, Agent, or Designee.* An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).
>
> (4) *Unavailable Witness.* A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds:
>
> ***
>
> (B) that the witness is **more than 100 miles from the place of hearing or trial** or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;

Fed. R. Civ. P. 32(a) (emphasis added).

Peterson first argues that the deposition testimony of Mr. Mullikin, Mr. Henderson and Mr. Kinyon cannot be used at trial because no condition set forth in Rule 32(a) has been met. Motion at 4. Specifically, Peterson asserts that "none of the subject deponents were employed by Peterson at the time they were deposed and Mr. Mullikin was never designated a spokesperson for Peterson on the subject matter of interest to Plaintiffs [sic], making the deposition testimony of these three former employees inadmissible" as non-compliant with Rule 32(a). *Id.* However, as clearly shown above, use of deposition testimony under Rule 32(a) is not limited to deponents who are current officers, managing agents or designees of a corporate litigant. Because Mr. Mullikin, Mr.

Henderson and Mr. Kinyon all reside "at a greater distance than 100 miles from the place of . . . trial," they are "unavailable" and their deposition testimony is properly designated under Rule 32(a). *See* Exs. 10 (Mullikin Map); 11 (Henderson Map); and 12 (Kinyon Map). Thus, contrary to Peterson's position, the State's use of the deposition testimony of these witnesses is expressly allowed by Rule 32(a).

2. Admissibility Under the Federal Rules of Evidence

Peterson argues that, even if the State were to show that the deposition testimony of Mr. Mullikin, Mr. Henderson and Mr. Kinyon satisfies Rule 32(a), the testimony is still inadmissible because it does not satisfy Rule 801(d)(2)(D) of the Federal Rules of Evidence. Motion at 4. A statement is not hearsay under Rule 801(d)(2)(D), however, if it is made by the opposing party's "agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship" (emphasis added). The deposition testimony need not satisfy Rule 801(d)(2)(D) to be admissible. This is so because while deposition testimony is ordinarily inadmissible hearsay, Rule 32(a) creates an exception to the hearsay rule. *Angelo v. Armstrong World Indus., Inc.*, 11 F.3d 957, 962-63 (10th Cir. 1993).

Under Rule 802, hearsay is admissible where allowed by the Federal Rules of Evidence, or "by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." Fed. R. Evid. 802. Rule 32(a)(4)(B) is one of these "other rules." *See* Fed. R. Evid. 802 Advisory Committee's Note (identifying Rule 32 as one of the "other rules"). In addition to the Tenth Circuit's decision in *Angelo*, several other circuit courts have recognized that Rule 32(a) is an independent exception to the hearsay rule. *See Nationwide Life Ins. Co. v. Richards*, 541 F.3d 903, 914-15 (9th Cir.

2008); *Ueland v. United States*, 291 F.3d 993, 996 (7th Cir. 2002) ("Rule 32(a), as a freestanding exception to the hearsay rule, is one of the 'other rules' to which Fed. R. Evid. 802 refers. Evidence authorized by Rule 32(a) cannot be excluded as hearsay, unless it would be inadmissible even if delivered in court."); *S. Indiana Broadcasting, Ltd. v. FCC*, 935 F.2d 1340, 1341-42 (D.C. Cir. 1991) (recognizing that Fed. R. Civ. P. 32(a) creates an exception to the hearsay rule); *United States v. Vespe*, 868 F.2d 1328, 1339 (3d Cir.1989) (Rule 32(a)(3)(B) "constitutes an independent exception to the hearsay rule"); *Carey v. Bahama Cruise Lines*, 864 F.2d 201, 204 & n.2 (1st Cir. 1988) (explaining that Rule 32(a)(3)(B) "is more permissive than Federal Rule of Evidence 804(a)(5)"). In sum, because Mr. Mullikin's, Mr. Henderson's and Mr. Kinyon's deposition testimony at issue satisfies Rule 32(a) (a hearsay exception), the State need not show that the testimony constitutes admissions by a party-opponent under Fed. R. Evid. 801(a)(2)(D).

Having established that the hearsay rule does not bar admission, the designated deposition testimony is otherwise admissible as being relevant. The designated testimony largely goes to Peterson's knowledge of the environmental impacts of land-applied poultry waste. Such knowledge is particularly relevant in establishing the applicability of Restatement (Second) of Torts § 427B. Under Restatement (Second) of Torts § 427B, one is liable for the acts of one's independent contractor if one is aware or should be aware that in the ordinary course of doing the contract work, a nuisance or trespass is likely to result. As a whole, the deposition testimony also supports the State's substantive claim that land-applied poultry waste in the IRW is -- and is likely to – run off. Outside of its arguments concerning the *City of Tulsa* case, Peterson does not

generally contend that the deposition testimony at issue is irrelevant. In sum, the deposition testimony of Mr. Mullikin, Mr. Henderson and Mr. Kinyon should not be limited or excluded.

B. Mr. Mullikin's Memoranda Should *Not* Be Excluded

Aside from seeking to limit or exclude the deposition testimony of Mr. Mullikin, Mr. Henderson and Mr. Kinyon, Peterson seeks to exclude the above-discussed memoranda written by Mr. Mullikin. Motion at 5-7. Specifically, Peterson argues that the "limitation in Rule 801(d)(2)(D) also precludes the admission of Mr. Mullikin's memoranda for any use." Motion at 5. This argument is without merit as the statements in the memoranda plainly constitute admissions by a party-opponent under Rule 801(d)(2)(D).

Again, a statement is not hearsay under Rule 801(d)(2)(D) if it is made by the opposing party's "***agent or servant*** concerning a matter ***within the scope of the agency or employment***, made ***during the existence of the relationship***" (emphasis added). Mr. Mullikin was an agent or employee of Peterson at the time that the memoranda were written. Further, the memoranda concerned environmental matters, which were undoubtedly within the scope of his employment. And the statements in the memoranda were made during Mr. Mullikin's employment with Peterson. Therefore, the Mullikin memoranda are independently admissible as admissions by a party-opponent under Rule 801(d)(2)(D). The fact that Peterson claims to clarify, explain or otherwise controvert Mr. Mullikin's memoranda does not render those memoranda inadmissible.[1] Admissions

[1] Selectively quoting from one of the memoranda, Peterson claims that the Mullikin memoranda were merely the personal opinions of Mr. Mullikin that he was not authorized to give. However, the record shows that Mr. Mullikin was not some

under Rule 801(d)(2)(D) are statements made by a "party's agent . . . which the trier of fact may evaluate as it sees fit." *United States v. Blood*, 806 F.2d 1218, 1221, n.2 (4th Cir. 1986).

Peterson further argues that the Mullikin memoranda should be excluded under Fed. R. Evid. 403. In support of its argument, Peterson avers that the Court has "previously determined that discovery materials from the *City of Tulsa* lawsuit, such as Mr. Mullikin's memoranda, are of limited probative value." Motion at 5 (citing Dkt. #932). However, in the very Order cited by Peterson, the Court clarified that it was "not holding that no documents from the *City of Tulsa* case are relevant to this action." Dkt. #932 at 6 (emphasis added). Further, that Order, issued by the Court October 4, 2006, made no mention of Mr. Mullikin and made no determination about the relevance of the memoranda at issue here. *Id.*

The memoranda discuss environmental issues that are universal and not limited to any particular watershed. The memoranda demonstrate Peterson's knowledge of these issues (*e.g.*, "[alternative uses] all address the environmental need to stop applying litter to our local pasture lands" (Ex. 3)). From the beginning of this lawsuit, Defendants have attempted to draw a distinction between the IRW and Eucha-Spavinaw watersheds, but the same environmental principles apply to both watersheds. The memoranda show that

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unimportant low-level employee. He was Peterson's director of environmental affairs. And Peterson expressly charged him with gathering and presenting information on environmental matters. As Mr. Henderson testified, "Ron **Mullikin** probably was the guy that kind of **spearheaded keeping an eye on all the environmental matters** we had to deal with, including litter, and he tried to stay abreast on the latest knowledge on that and what the latest thinking was." Ex. 8 (D. Henderson Depo. at 26) (emphasis added). Therefore, the State submits that Mr. Mullikin's statements on environmental matters had special importance beyond his own personal opinion. In any event, Mr. Mullikin's memoranda do pass the admissibility test under Rule 801(a)(2)(D). The trier of fact can decide what weight to give to Mr. Mullikin's memoranda.

Peterson has long been on notice that over-application of poultry waste leads to accumulation of phosphorus in the soil and runoff and that this runoff causes ecologic injuries. The probative value of these memoranda is undeniable and outweighs any claim of prejudice by Peterson.

II. Use of Mr. Mullikin's Deposition Testimony from the *City of Tulsa* Case Should Be Allowed

The State has designated limited portions of Mr. Mullikin's 2002 deposition testimony from the *City of Tulsa* case. Ex. 13 (Mullikin *City of Tulsa* designations). Again relying heavily on the Court's October 4, 2006 Order denying certain motions to compel materials from the *City of Tulsa* case, Peterson argues that Mr. Mullikin's testimony in that case is irrelevant. Motion at 7. That Order did not bar use of *City of Tulsa* materials, and made no mention of Mr. Mullikin whatsoever. Additionally, the designated *City of Tulsa* testimony is relevant to the issue of corporate knowledge. For instance, as shown *supra*, Mr. Mullikin testified in 2002 that the poultry integrators, including Peterson, started gaining awareness of the problems with excess phosphorus in northwest Arkansas in the mid-1990s. Ex. 2 (7/18/02 Mullikin Depo., pp. 167-69). Mr. Mullikin also testified about his knowledge that he brought to Peterson concerning soil science, nutrients and agronomic need. *Id.* at 119-120. The *City of Tulsa* deposition testimony is relevant.

Peterson also asserts that Mr. Mullikin's *City of Tulsa* deposition testimony is improper under Fed. R. Civ. P. 32(a) and inadmissible hearsay. Motion at 7. However, for largely the same reasons that his deposition testimony from the present action is admissible, Mr. Mullikin's designated deposition testimony from the *City of Tulsa* case is admissible. Again, it is a matter of Mr. Mullikin's unavailability (outside of 100 miles

from where the case will be tried) on both counts. Ex. 10 (Mullikin Map). Because Mr. Mullikin is unavailable, deposition testimony, even from a separate proceeding such as the *City of Tulsa* case, may be properly used at trial under Fed. R. Civ. P. 32(a)(4)(B) and is not hearsay.

Peterson claims that Mr. Mullikin's *City of Tulsa* deposition testimony does not "pass muster" under Fed. R. Evid. 804(b)(1). But Rule 804(b)(1) is irrelevant to the Court's inquiry. "[B]ecause [Mullikin's *City of Tulsa* deposition] testimony properly was admitted under Rule 32(a)(4)(B), it need not also meet the requirements for admissibility set forth in Rule 804(b)(1)." *Richards*, 541 F.3d at 914. Nonetheless, even if the Court determines that Rule 804(b)(1) is applicable, Mr. Mullikin's *City of Tulsa* deposition testimony satisfies that Rule.

Federal Rule of Evidence 804(b)(1) provides:

> (b) *Hearsay Exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) *Former testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with the law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Because Mr. Mullikin is unavailable to testify live and because his *City of Tulsa* deposition is testimony given "in a deposition taken in compliance with the law in the course of . . . another proceeding," it is not excluded by the hearsay rule under Rule 804(b)(1). Peterson claims that Rule 804(b)(1) is not satisfied because it did not have the opportunity and similar motive to develop the testimony at Mr. Mullikin's 2002 deposition. Motion at 9. However, there is no material difference between Peterson's

defenses in the *City of Tulsa* case and its defenses in the present litigation. Peterson's "motive" is the same today as it was then. Peterson today, as it did then, seeks to avoid liability for the environmental damage caused by the land application of poultry waste generated by its birds. So, even if Rule 804(b)(1) were necessary to the Court's determination of the Motion in Limine, which it is not, Mr. Mullikin's *City of Tulsa* deposition satisfies the requirements of Rule 804(b)(1).

Lastly, Peterson asserts that Mr. Mullikin's *City of Tulsa* deposition is cumulative and should therefore be excluded under Fed. R. Evid. 403. But, Mr. Mullikin is a unique witness who provides valuable insight into the historic knowledge of Peterson and the poultry industry as a whole. His testimony in 2002 is important as it was taken during a period in time when events would have been fresh in his mind. For instance, the State has designated the following testimony from Mr. Mullikin's 2002 deposition:

> Q. When did the -- if you gained any knowledge of this, when did any of the integrator industry start gaining awareness of the -- of there being a problem with excess phosphorus in watersheds?
>
> A. It would seem to me that it became something on their radar screen, so to speak, at about the time I went to work for Peterson Farms.
>
> ***
>
> Q. And when did you learn that the problems manifested themselves let's start with Delmarva, approximately when?
>
> A. I think their problems started to really be recognizable two or three years before we recognized a problem in northwest Arkansas.
>
> Q. So you are saying mid-'90s or even before then?
>
> A. I think mid-'90s.
>
> Q. Mid-'90s?
>
> A. Yeah.

Ex. 2 (7/18/02 Mullikin Depo. at 167-69). This testimony is clearly relevant and not cumulative of any testimony given by any other witness in this action and is not cumulative of Mr. Mullikin's 2007 deposition testimony. Mr. Mullikin's *City of Tulsa* deposition testimony should not be excluded under Rule 403.

III. The Opinions of Mr. Mullikin Are Admissible

In the last proposition of the Motion in Limine, Peterson argues that opinion testimony of Mr. Mullikin is inadmissible because he lacks the requisite qualifications to opine about environmental matters. Motion at 12-14. This is somewhat ironic considering the fact that Peterson deemed Mr. Mullikin qualified enough to be its director of environmental affairs. In any event, Mr. Mullikin's statements of opinion or inference are admissible in this action.

First, to the extent that Mr. Mullikin's opinions constitute admissions by party-opponent, there is no need to show any indicia of trustworthiness as required by Rules 701 or 702 of the Federal Rules of Evidence. As the Tenth Circuit reasoned in *Grace United Methodist Church v. City of Cheyenne,* 451 F.3d 646, 667 (10th Cir. 2006):

> While opinion testimony admitted pursuant to Rule 701 "requires a lay witness to have first-hand knowledge of the events he is testifying about so as to present only the most accurate information to the finder of fact," *United States v. Hoffner*, 777 F.2d 1423, 1425 (10th Cir.1985), an admission of a party opponent needs no indicia of trustworthiness to be admitted. *United States v. Pinalto,* 771 F.2d 457, 459 (10th Cir.1985) ("The district court erroneously viewed trustworthiness as a separate requirement of admission under Section 801(d)(2)(A)."). Thus, as the court said in *Jewel v. CSX Transp., Inc.*, 135 F.3d 361, 365 (6th Cir.1998), "[t]he admissibility of statements of a party-opponent is grounded not in the presumed trustworthiness of the statements, but on 'a kind of estoppel or waiver theory, that a party should be entitled to rely on his opponent's statements.' " (quoting *United States v. DiDomenico,* 78 F.3d 294, 303 (7th Cir. 1996)).

(emphasis added). In this vein, the Tenth Circuit has repeatedly held that "an admission of a party-opponent may be introduced in evidence even though the declarant lacked personal knowledge of the matter asserted." *Grace United Methodist Church*, 451 F.3d at 667 (citing *Smedra v. Stanek*, 187 F.2d 892, 894 (10th Cir. 1951)). While Peterson claims that Mr. Mullikin's opinions are his own personal opinions, his opinions expressed during the course of his employment as Peterson's director of environmental affairs are admissions by a party-opponent under Fed. R. Evid. 801(a)(2)(D). Therefore, to the extent those memoranda contain opinions, Mr. Mullikin need not be qualified to give those opinions or even have personal knowledge of the matter asserted.

Beyond the memoranda themselves, Mr. Mullikin can properly give testimony based upon opinion or inference under Fed. R. Evid. 701. As director of environmental affairs, it was plainly part of Mr. Mullikin's job to attend environmental meetings, gather information and present that information to Peterson. Rule 701 provides that:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.

Mr. Mullikin's opinion testimony meets the Rule 701 standard of admissibility.

As an example, during his 2007 deposition, Mr. Mullikin was asked to, and did, further explain what certain statements in his March 27, 1998 memoranda meant:

> Q. First, let me ask you, what effect on the environment did you feel the company would be found liable for?
>
> ***
>
> A. The effect of phosphate loading.

> Q. Into the water?
>
> A. Yes, sir.
>
> Q. On what did you base that?
>
> A. From what I recall, it would have been on those meetings that I had attended and information I had seen and statements that I had heard made by various federal and state agencies.

Ex. 1 (11/14/07 Mullikin Depo. at 56). Thus, Mr. Mullikin's opinion or inference that the industry would be held liable for the effect of phosphorus loading into the water was based upon his perception gained interacting with federal and state agencies and attending meetings as part of his duties as Peterson's director of environmental affairs. This opinion or inference is relevant to the corporate knowledge of Peterson with respect to its potential environmental liabilities and is "not based on scientific, technical or other specialized knowledge within the scope of Rule 702." Consequently, such opinion testimony is admissible under Rule 701. *See, e.g., United States v. Hoffman-Vaile*, 568 F.3d 1335, 1342 (11th Cir. 2009).

III. Conclusion

Based on the foregoing, Defendants' Motion in Limine (Dkt. #2395) should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 20th day of August, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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